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8991—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN AND ROBERT GOTTFRIED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 458–463) has not yet been reported. The District Court for the Southern District of New York rendered no opinion.

JURISDICTION

The judgment sought to be reviewed was entered June 21, 1937. (R. 463.) The petition for a writ of certiorari was filed July 3, 1937. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code as amended. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether evidence procured by tapping telephone wires and intercepting telephone messages is inadmissible in a Federal prosecution in view of Section 605 of the Federal Communications Commission Act of June 19, 1934.

STATUTE INVOLVED

Section 605 of the Federal Communications Commission Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), the part of which is here material being italicized, is as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court

of competent jurisdiction, or on demand of other lawful authority; and *no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [Italics ours.]

Section 501, the penal section of the statute, provides (48 Stat. 1100, U. S. C., Title 47, Sec. 501):

Any person who willfully and knowingly does or causes or suffers to be done any act,

matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

STATEMENT

On May 15, 1936, an indictment in three counts was returned against the petitioners in the Southern District of New York growing out of the smuggling of a large quantity of alcohol. (R. 3–10.) Each of the petitioners was convicted upon all of the counts. (R. 400.) Petitioner Nardone was sentenced to three years' imprisonment and the other petitioners to a year and a day. (R. 401.)

Without citation to the record, the petitioners allege that the trial court committed reversible error in permitting the introduction in evidence over their objection of a number of telephone conversations between the petitioners and others which Federal agents had intercepted by means of tapped wires. (Pet. p. 2.) The Circuit Court of Appeals in its opinion states that the prosecuting attorney selected for introduction in evidence 72 of the some 500 telephone conversations to which

the agents listened and of which they made notes. (R. 460.) The Circuit Court of Appeals further stated that enough of these messages were interstate and foreign as to render it unnecessary to make any distinction between what were purely intrastate and what were not (R. 462), and that the messages "had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question." (R. 460.) The messages to which reference has been made were apparently those testified to by one Picarelli, an agent of the Alcohol Tax Unit. (R. 175–234, 236–253.) It is not contended that the tapping of the telephone wires was accomplished through any trespass committed upon property of the petitioners.

The Circuit Court of Appeals held that the evidence as to the telephone conversations was properly admitted and unanimously affirmed the convictions of the petitioners. (R. 461–463.)

ARGUMENT

The only question presented is whether Section 605 of the Federal Communications Commission Act of 1934, *supra,* prohibits the introduction in evidence in a criminal trial in a Federal court of telephone conversations overheard by Federal agents by means of tapped wires.

In *Olmstead* v. *United States,* 277 U. S. 438, this Court held that the use of such evidence did not

constitute a violation of the Fourth and Fifth Amendments. This Court also held that such evidence was not inadmissible because the mode of obtaining it was a misdemeanor under state statute. After stating (p. 467) that "The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained," this Court said (pp. 468–469):

> The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 2656–18) that:
>
> "'Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor."
>
> This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N. Y.) 806. * * *

In the course of its opinion the Court also said (pp. 465–466):

> Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence.

The *Olmstead* decision was rendered by this Court in 1928, and it is the position of the petitioners that Section 605 was inserted in the Federal

Communications Commission Act of 1934 as a result of the statement by this Court in that decision as to the undoubted power of Congress to provide by direct legislation for the inadmissibility in evidence in a Federal criminal prosecution of evidence obtained by means of wire tapping. Petitioners assert, therefore, that the *Olmstead* decision is not controlling in the instant case.

That there is no merit in the petitioners' position is apparent from the fact that the same language that the petitioners rely upon in Section 605 of the Federal Communications Commission Act of 1934 was employed, *mutatis mutandis,* in the Radio Act of February 23, 1927, c. 169, Sec. 27, 44 Stat. 1162, 1172, which was enacted over a year prior to the decision in the *Olmstead case* and, of course, involved a subject matter as to which wire tapping was not germane. As found in the Radio Act of 1927, the provision read:

> no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; * * *.

Moreover, it must be obvious that the language found in Section 605 of the Federal Communications Commission Act of 1934, although broad, is not the language that would ordinarily have been employed if Congress had had in mind a direct prohibition of the use in evidence of telephone mes-

sages intercepted as the result of wire tapping. In addition, the announced purpose of the Federal Communications Commission Act is devoid of any suggestion that Congress had any such object in mind. (Section 1, 48 Stat. 1064, U. S. C., Title 47, Sec. 151.)

Read in the light of the subsequent provisions in Section 605, it is evident that the provision in question was aimed primarily at the unauthorized publication of radio, telegraph and telephone communications for purposes of private gain or benefit. Thus construed, the provision constitutes a statutory affirmation in the field of communication by radio and wire of principles long established in connection with private letters and other similar writings.

In *Folsom* v. *Marsh,* 9 Fed. Cas. 342, 346, Mr. Justice Story said:

> In short, the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. * * * *A fortiori,* third persons standing in no privity

> with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion.

See also Notes in 37 L. R. A. (N. S.) 944 and 51 L. R. A. 353; *Baker* v. *Libbie,* 210 Mass. 599; *Knights of the K. K. Klan* v. *International Magazine Co.,* 294 Fed. 661 (C. C. A. 2d). A recognized exception to the general rule, however, is "that 'for the purposes of public justice publicly administered, according to the established institutions of the country,' private letters in the hands of a party other than the writer must always be produced unless such letters would tend to criminate the person required by law to produce them." *Barrett* v. *Fish,* 72 Vt. 18, 51 L. R. A. 754, and Note; *King* v. *King,* 25 Wyo. 275, 285.

Moreover, although the Federal Communications Commission Act was passed over six years after the decision of this Court in the *Olmstead* case, there is nothing in the legislative history of Section 605 which indicates that Congress had in mind the prohibition of the use of evidence obtained as a result of wire tapping. In submitting its report on the bill, the Senate Committee on Interstate Commerce simply said:

> Section 605 prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act and extends it to wire communications. S. Rep. No. 781, 73d Cong., 2d Sess. p. 11, Con. Doc. 9770.

The question presented was directly involved in the case of *Smith* v. *United States* (unreported), May 24, 1937. The Court of Appeals for the District of Columbia, in holding that evidence obtained by means of wire tapping was admissible, said:

> The second assignment relied upon by appellants is that evidence secured by wire tapping was admitted by the trial court against the objections and exceptions of appellants. This assignment must be overruled upon the authority of *Olmstead* v. *United States,* 277 U. S. 438. See also: *Beard* v. *U. S.,* 65 App. D. C. 231; 82 F. (2d) 837. It is also alleged by appellants that such evidence was illegal under the provisions of the act of Congress commonly known as the Communications Act of 1935, sec. 605, tit. 47 U. S. C. We cannot however sustain this contention. *Olmstead* v. *United States, supra.*

Beard v. *United States,* 82 F. (2d) 837, 841 (App. D. C.), certiorari denied, 298 U. S. 655, cited in the above opinion, was decided after the ~~*Olmstead* case~~. statute involved was pas

Hearst v. *Black* 87 F. (2d) 68 (App. D. C.), cited by the petitioners, was decided by the same court which decided the *Smith* case, *supra.* The question here presented was not involved.

CONCLUSION

The case was correctly decided below and there is involved no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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